Supreme Court, U. S.
FILED
MAR 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

Case No. 79-1450

LOIS CHAPMAN

Petitioner,

—v.—

CITY OF TALLMADGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BERNARD A. BERKMAN
BERKMAN, GORDON, LEVY, MURRAY and PALDA
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245
Attorney for Petitioner

GEORGE W. PALDA,
Of Counsel

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW.....	2
JURISDICTION.....	2
QUESTION PRESENTED FOR REVIEW.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	3
REASON FOR GRANTING THE WRIT	
AN IMPORTANT QUESTION FOR REVIEW, EXPRESSLY RESERVED FOR DECISION BY THIS COURT IN PARIS ADULT THEATRE V. SLATON, 413 U.S. 49 (1973), IS PRESENTED BY THIS CASE CONCERNING WHETHER, IN A STATE CRIMINAL PROSECUTION FOR PANDERING OBSCENITY, EXPERT TESTIMONY IS REQUIRED TO PROVE THE ESSENTIAL ELEMENT OF APPEAL TO THE PRURIENT INTEREST OF THE DEVIANT GROUP TO WHOM THE SUBJECT MATERIAL CLEARLY IS DIRECTED.....	8
CONCLUSION.....	15
APPENDIX	
Order Extending Time To File Petition for Writ of Certiorari.....	1a

TABLE OF CONTENTS (CONT.)

	Page
Judgment of the Supreme Court of Ohio.....	2a
Decision and Journal Entry in the Court of Appeals, Ninth Judicial District.....	3a
Propositions of Law Presented in Memorandum in Support of Jurisdiction to Supreme Court of Ohio.....	14a
Assignments of Error to Ohio Court of Appeals, Ninth Appellate District.....	15a
Excerpts from Transcript of Proceedings in the Municipal Court of Cuyahoga Falls, Ohio.....	16a
Constitution of the United States, First Amendment.....	17a
Constitution of the United States, Fourteenth Amendment...	17a
Tallmadge City Code of Ordinances, Section 76.1.....	18a
Tallmadge City Code of Ordinances, Section 76.11.....	19a

TABLE OF AUTHORITIES

Cases	Page
Hamling v. United States, 418 U.S. 293 (1978).....	11,12
In re Winship, 397 U.S. 358 (1970).....	8
Miller v. California, 413 U.S. 15 (1973).....	9,12
Mishkin v. New York, 383 U.S. 502 (1966).....	9,10, 11,12
Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973).....	8,10, 11,13
Pinkus v. United States, 436 U.S. 293 (1978).....	11,12
Roth v. United States, 354 U.S. 476 (1957).....	9
United States v. Klaw, 350 F. 2d 155 (2nd Cir. 1965).....	11,13, 14
Constitutional Provisions	
First Amendment.....	3,14
Fourteenth Amendment.....	3,14
Statutory Provisions	
28 U.S.C. §1257(3).....	2
Other Sources	
Codified Ordinances of the City of Tallmadge, Section 76.1.....	3,5
Section 76.11.....	1,3

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. _____

LOIS CHAPMAN,

Petitioner,

v.

CITY OF TALLMADGE, OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OHIO

Petitioner Lois Chapman prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court that dismissed petitioner's appeal to that court for want of substantial constitutional question. The dismissal of the appeal by the Ohio Supreme Court thereby affirmed the judgment of the Ohio Court of Appeals for the Ninth Appellate District which had affirmed petitioner's convictions in the Municipal Court for Cuyahoga Falls, Ohio, on three counts of pandering obscenity in violation of §76.11 of the codified ordinances of the City of Tallmadge, Ohio.

OPINIONS BELOW

The judgment of the Ohio Supreme Court dismissing petitioner's appeal is unreported and is set forth in the Appendix, infra, at 2a. The decision and journal entry of the Ohio Court of Appeals for the Ninth Appellate District is unreported and is set forth in the Appendix, infra, at 3a-13a.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing petitioner's appeal as of right was entered on October 19, 1979. Appendix at 2a. On January 8, 1980, Mr. Justice Stewart, upon application by petitioner, granted an order extending the time within which to file a petition for a writ of certiorari from January 17, 1980 to and including March 17, 1980. Appendix at 1a.

This petition seeks review of a final judgment rendered by the Ohio Supreme Court, the highest court in the State of Ohio in which a decision could be had. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3) because rights, privileges, and immunities under the Constitution of the United States are claimed to have been violated.

QUESTION PRESENTED FOR REVIEW

In a state criminal prosecution for pandering obscene materials, where the materials in question were clearly directed at bizarre deviant groups, but no expert testimony was offered concerning the materials' appeal to the prurient

interest of such deviant groups, were convictions for pandering obscene materials obtained in violation of the First and Fourteenth Amendments of the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the First Amendment and the pertinent portion of the Fourteenth Amendment to the United States Constitution are set forth in the Appendix at 17a. The text of the pertinent portions of §§76.1 and 76.11 of the codified ordinances of the City of Tallmadge, Ohio, are set forth in the Appendix at 18a.

STATEMENT OF THE CASE

On November 30, 1978, petitioner Lois Chapman was convicted by a jury in the Municipal Court of Cuyahoga Falls, Ohio, of three counts of pandering obscenity in violation of §76.11 of the codified ordinances of the City of Tallmadge, Ohio, a city within the jurisdiction of the Cuyahoga Falls Municipal Court. Petitioner was fined a total of $2,000.00 and sentenced, on two counts, to thirty (30) days confinement in county jail, to run concurrently. The judgment and sentence of the trial court were affirmed by the Ohio Court of Appeals for the Ninth Appellate District. Petitioner's appeal to the Ohio Supreme Court subsequently was dismissed for want of substantial constitutional question.

At trial, the prosecution's case consisted of only the testimony of a police officer and the introduction into evidence of the four magazines alleged to be obscene. The police officer described the interior of the bookstore where he purchased the magazines during the course of two visits to the store (T. 5-12). The officer identified the petitioner as the employee of the bookstore who sold the magazines to him (T. 14) and also identified the State's Exhibits A, B, C and D as the four magazines which he had purchased (T. 16-21). Following introduction of the magazines into evidence, the prosecution rested its case (T. 55).

Petitioner thereafter moved for judgment of acquittal based in part on the failure of the prosecution to prove the prurient appeal to the deviant groups to which the material was directed (T. 58-86). After the motion for judgment of acquittal was overruled, petitioner presented her defense which included testimony from two experts concerning the community standards.

No expert testimony was offered concerning the prurient appeal to deviant groups, although the prosecutor, in cross-examination, made reference to the bizarre or deviant behavior depicted in the four magazines including "extreme or bizarre violence" (T. 126), "cruelty", "brutality" (T. 127), "human functions of elimination" (T. 128). In response to questions concerning deviant sexual activities, one of the experts testified he was not qualified to answer if the materials would be sexually stimulating to a person of that

category or group (T. 124-125). At the close of her defense, petitioner again moved for judgment of acquittal (T. 260).

In final argument to the jury, the prosecution stressed that no experts were required to prove that the materials were obscene (T. 268-270). Thereafter, the trial court instructed the jury and presented the jury with written instructions which were taken into the jury room for deliberations (see, T. 303). The written jury instructions, in part, stated that:

> "Section 76.1 'Definitions' of the Tallmadge Codified Ordinances states under Section 76.1(F) 'when considered as a whole, applying local community standards, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is 'obscene' if the following apply:
>
> (1) Its dominant appeal is to prurient interest; and
>
> (2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite; or

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; or

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose; and

(5) When taken as a whole, it lacks serious literary, artistic, political or scientific value." (Emphasis added).

The jury, after retiring for deliberation, twice reported to the trial court that it could not reach a verdict. However, after the trial court admonished that considerable effort had been expended by both parties and urged that the jury continue to deliberate, the jury returned with a verdict of guilty on all three counts of pandering obscene materials.

On appeal to the Ohio Court of Appeals for the Ninth Appellate District, petitioner assigned as error the failure of the prosecution to offer any evidence concerning the prurient appeal of the materials to the deviant group to whom the materials were targeted (Appendix at 15a). Petitioner urged that: "The 'average person' can...

not be the judge of prurient appeal of sexually deviant or bizarre materials." Brief of Petitioner to the Ohio Court of Appeals at 12. Petitioner urged that, because the prosecution had failed to present evidence of prurient appeal to targeted deviant groups, the prosecution had failed in its proof of one of the essential elements of obscenity. Petitioner's Brief to the Ohio Court of Appeals at 14.

The court of appeals rejected the assignment of error and held that: "The state thus produced overwhelming evidence justifying the jury in finding prurient appeal...." Decision and Journal Entry of the Court of Appeals, Appendix at 5a.

On appeal to the Ohio Supreme Court, petitioner again assigned as error in the propositions of law that the prosecution failed in its proof of prurient appeal, an essential element of the crime charged. Appendix at 14a. However, the Ohio Supreme Court, without opinion, dismissed petitioner's appeal for want of substantial constitutional question. Appendix at 2a.

REASON FOR GRANTING THE WRIT

AN IMPORTANT QUESTION FOR REVIEW, EXPRESSLY RESERVED FOR DECISION BY THIS COURT IN PARIS ADULT THEATRE V. SLATON, 413 U.S. 49 (1973), IS PRESENTED BY THIS CASE CONCERNING WHETHER, IN A STATE CRIMINAL PROSECUTION FOR PANDERING OBSCENITY, EXPERT TESTIMONY IS REQUIRED TO PROVE THE ESSENTIAL ELEMENT OF APPEAL TO THE PRURIENT INTEREST OF THE DEVIANT GROUP TO WHOM THE SUBJECT MATERIAL CLEARLY IS DIRECTED.

Petitioner urged as error in the courts below that the state had failed to sustain its burden of proof that the materials, which were the subject of the prosecution, appealed to the prurient interest of the deviant groups to whom the materials were clearly directed. Because the prosecution had failed to present any expert witness testimony concerning the prurient appeal of the materials to deviant sexual groups, petitioner urged that the prosecution had failed to prove one of the essential elements of the crime of pandering obscenity.

It is a well-established requirement of due process that in a criminal case, the prosecution has the burden of proving each and every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Further, in criminal prosecutions concerning alleged obscene materials, this Court

has required, as part of a tri-partite test, that the prosecution prove that the work, taken as a whole, appeals to the prurient interest of the person(s) to whom the work is directed. Miller v. California, 413 U.S. 15, 24-25 (1973). Since this Court's decision in Mishkin v. New York, 383 U.S. 502 (1966), it is clear that the obscenity vel non of a particular work is not to be judged solely on the appeal to the prurient interest of an 'average' adult, but on the prurient appeal to those person(s) to whom the work is directed.

In rejecting the argument that books "depicting various deviant sexual practices ...do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the 'average person'...that 'instead of stimulating the erotic, they disgust and sicken'" (Mishkin v. New York, supra, 383 U.S. at 508), this Court stated:

> "Where material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth [v. United States, 354 U.S. 476 (1957)] test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group...We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended

and probable recipient group...." Mishkin v. New York, supra, 383 U.S. at 508-509.

The Court in Mishkin went on to find abundant evidence in the record of the prurient appeal of the materials to deviant sexual groups:

> "No substantial claim is made that the books depicting sexually deviant practices are devoid of prurient appeals to sexually deviant groups. The evidence fully establishes that these books were specifically conceived and marketed for such groups... [T]o be certain that authors fulfilled his purpose, appellant furnished them with such source materials as Caprio, Variations in Sexual Behavior, and Krafft-Ebing, Psychopathia Sexualis... [A]ppellant's own evaluation of his material confirms such a finding." 383 U.S. at 509-510.

In Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973), the Court held that expert witness testimony was not required to prove that the subject materials were obscene where the materials themselves were placed in evidence; the materials were "the best evidence of what they represent." 413 U.S. at 56. However, the Court expressly reserved consideration of the question of the nature of evidence required,

> "where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest. See Mishkin v. New York, 383 U.S. 502, 508-510 (1966); United States v. Klaw, 350 F. 2d 155, 167-168 (2nd Cir. 1965)." 413 U.S. at 56 n. 6.

The question reserved in Paris Adult Theatre v. Slaton, supra, has not been answered, although the Court has considered related questions involving the prurient appeal requirement as applied to materials directed to deviant groups. In Hamling v. United States, 418 U.S. 293 (1978), and in Pinkus v. United States, 436 U.S. 293 (1978), the Court considered questions of the propriety of jury instructions concerning the prurient appeal of materials to deviant groups.

In Hamling v. United States, supra, one of the questions presented to the Court was whether the trial court erred by instructing that the jury could consider whether some portion of the materials in question appealed to a prurient interest of a specifically defined deviant group as well as whether they appealed to the prurient interest of the average person. 418 U.S. at 127-128. The Court held that the testimony of an expert witness presented by the government supplied sufficient evidence that some of the materials appealed to the prurient interest of specific deviant sexual groups. The

Court reasoned that the instruction was fully consonant with the holdings in Mishkin v. New York, supra, and Miller v. California, supra. Hamling v. United States, supra, 418 U.S. at 128-129.

In Pinkus v. United States, supra, the Court was asked to review the lower courts' reliance upon the holding in Hamling to justify an instruction on prurient appeal to deviant groups when, it was urged, there was insufficient evidence in the record of the prurient appeal of the materials to deviant groups. The Court in Pinkus upheld the propriety of the instruction because the government, on rebuttal, had presented the testimony of an expert witness concerning the prurient appeal of the materials to specified deviant groups. The Court stated:

> "Nothing prevents a court from giving an instruction on prurient appeal to deviant sexual groups as part of an instruction pertaining to appeal to the average person when evidence, as here, would support such a charge." Pinkus v. United States, supra, 436 U.S. at 302.

In disposing of the argument in Pinkus that in order to justify an instruction on prurient appeal to deviant groups, there must be evidence to guide the jury in its deliberations because jurors "cannot be presumed to know the reaction of such groups to stimuli...." 436 U.S. at 303, this Court responded that:

> "Concededly, in the past we have 'reserve[d] judgment...on the extreme case...where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the [particular] prurient interest.' Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n. 6, 93 S.Ct. 2628, 2634, 37 L.Ed.2d 446 (1973). But here we are not presented with that 'extreme' case because the government did in fact present expert testimony on rebuttal which, when combined with the exhibits themselves, sufficiently guided the jury." 436 U.S. at 303 (Emphasis added).

The instant petition presents the "extreme" case where the materials are clearly directed to deviant sexual groups, but where the record is totally devoid of evidence of the prurient appeal of the materials to those deviant sexual groups. The jury in the instant case was left to speculate without guidance from expert evidence, after being presented with written instructions which permitted inquiry into whether the materials appealed to the prurient interest of either average adults or members of deviant sexual groups. Because the prosecution emphasized the deviant sexual behavior depicted in the four magazines in question (supra, at 4), it is probable that the question of prurient appeal to deviant groups, albeit unexplained and unsubstantiated, was an important factor in the jury's deliberations.

Without proof of the materials' prurient appeal to deviant sexual groups, an essential element of the crime was circumvented.

Here, as in United States v. Klaw, 350 F. 2d 155 (2nd Cir. 1965),

> "[T]he jury had no opportunity to judge the exhibits presented to them by any standard other than their own speculation as to 'prurient interest'." 350 F. 2d at 170.

Furthermore,

> "if proof of prurient stimulation and response is generally important, it is particularly necessary when the prurient interest may be that of a deviant segment of society whose reactions are hardly a matter of common knowledge." 350 F. 2d at 166 (Emphasis added).

Without proper guidance from expert testimony, the jury easily could have equated 'patent offensiveness' with 'prurient appeal to a deviant group'. Therefore, petitioner's convictions for pandering obscenity, under these circumstances, clearly were violative of the First and Fourteenth Amendments. See, United States v. Klaw, supra, 350 F. 2d at 167.

CONCLUSION

This case presents a proper opportunity to resolve a troubling and persistent question which has been expressly left open by this Court. This Court has recognized in past decisions that a jury may properly consider the prurient appeal of materials directed to "average" adult persons simply on the basis of the materials themselves. Furthermore, although a jury may also consider the prurient appeal of materials to deviant sexual groups, this Court has indicated that jury instructions regarding such appeal were proper when supported by expert testimony. However, the decision in Paris Adult Theatre v. Slaton recognizes the reality that although a jury may substitute its experience for expert testimony regarding prurient appeal to normal people, such expertise cannot be assumed where materials are directed to deviant sexual groups because that would presuppose deviant sexual experience by those persons seated as jurors; a ludicrous presumption.

In prosecutions on both the state and federal levels, prosecutors continue to rely solely upon the perusal of alleged obscene materials by juries, without consideration by the prosecutors of whether the challenged materials are directed to deviant sexual groups. An important question remains open, expressly reserved for judgment by this Court, on an issue which is confronted daily in obscenity prosecutions thoughout the country.

Because of the importance of the question presented herein to rights guaranteed by the First and Fourteenth Amendment and to the orderly administration of criminal justice, petitioner Lois Chapman respectfully urges this Court to grant the writ of certiorari and accept this case for review. Upon review, this Court should reverse petitioner's convictions.

Respectfully submitted,

BERNARD A. BERKMAN
BERKMAN, GORDON, LEVY,
MURRAY and PALDA
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

GEORGE W. PALDA,
Of Counsel

SUPREME COURT OF THE UNITED STATES

No. A-587

LOIS CHAPMAN,

Petitioner,

v.

CITY OF TALLMADGE, OHIO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 17, 1980.

/S/ Potter Stewart
Associate Justice of the
Supreme Court of the
United States

Dated this 8th
day of January, 1980.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus	)	1979 Term To wit: October 19, 1979
City of Tallmadge, Appellee, vs. Lois Chapman, Appellant.	)	No. 79-1260 Appeal from the Court of Appeals for Summit County

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner proscribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

Holmes, J. not participating

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copies from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____, 19___.

_____ Clerk

_____ Deputy

STATE OF OHIO SUMMIT COUNTY	) SS:	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
CITY OF TALLMADGE Plaintiff-Appellee v. LOIS CHAPMAN Defendant-Appellant	)	C.A. No. 9140 APPEAL FROM JUDGMENT ENTERED IN THE CUYAHOGA FALLS MUNICIPAL COURT OF SUMMIT COUNTY, OHIO C.A. No. 78 CRB 1145

DECISION AND JOURNAL ENTRY

Dated: July 18, 1979

This cause was heard June 18, 1979, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

HUNSICKER, J.

On November 30, 1978, a jury in the Cuyahoga Falls Municipal Court entered three verdicts of guilty against Lois Chapman for violation of various sections of Chapter 76 of the Public Morality law of the City of Tallmadge, a territory within the jurisdiction of that court.

From the judgment entered on the jury's verdict, Lois Chapman appeals to this court, saying:

ASSIGNMENT OF ERROR I

"Tallmadge city code of ordinances, Sections 76.1 et seq., are unconstitutional on their face, and the court erred in permitting appellee to try and convict appellant thereunder."

ASSIGNMENT OF ERROR II

"The trial court erred in overruling appellant's motion for judgment of acquittal, as the state failed to produce evidence as to the prurient appeal and/or patent offensiveness of the materials alleged to be obscene, or to prove scienter."

The evidence established conclusively that Lois Chapman as manager of the Avenue Book Store in Tallmadge had full and complete knowledge of the nature and contents of the materials, books, papers and magazines she sold. She denied knowledge of the contents of the material she dispensed but it was obvious that she could not be believed in this instance. The news store has two sections, one in which current newspapers and magazines are sold and the other in which Doc Johnson's "love products", dildoes, vibrators, soap in the shape of vaginas and penises, and sexually oriented magazines are sold. The section wehre the "love products" and sexually oriented magazines were sold was limited to those over 21 years of age. The manager at the cashier counter could see all persons in either section. State v. Burgun, 56 Ohio St. 2d 354 (1978).

An examination of the papers and magazines introduced as evidence showed such exhibits to depict fellatio, cunnilingus, bestiality and sexual conduct. The persons shown were nude and with close view of the areas depicted. The state thus produced overwhelming evidence justifying the jury in finding prurient appeal, the patent offensiveness and obscene character of the material sold. The material here was hard core pornography. We reject assignment of error II.

This court has read the testimony and proceedings in its entirety. There is comment in the brief on the conduct of the jury or some member thereof and a comment concerning a Bible and a magazine in the jury room but no claim of error is based on these subjects. Hence, they are not considered in this appeal. We confine ourselves to the errors assigned.

The Ordinance, Chapter 76, of the City of Tallmadge is before this Court. The verdicts find Lois Chapman (1) guilty of the offense of "pandering obscenity" Tallmadge Ordinance §76.11(A)(2), June 15, 1978; (2) pandering obscenity, Tallmadge Ordinance §76.11(A)(5), July 1, 1978; (3) pandering obscenity, Tallmadge Ordinance §76.11(A)(2), July 1, 1978.

The sections of the Codified Ordinances of the City of Tallmadge named in the verdicts returned by the jury are:

Section 76.11(A)(2) which reads:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"* * *

"(2) Exhibit or advertise for sale or dissemination or sell or publicly disseminate or display any obscene material;"

Section 76.11(A)(5):

"Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section."

"Obscene" is defined in Section 76.1 (F)(1) through (5) as follows:

"(F) When considered as a whole, applying local community standards, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "Obscene" if the following apply:

"(1) Its dominant appeal is to prurient interest; and

"(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite; or

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty or bestiality; or

"(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose; and

"(5) When taken as a whole, it lacks serious literary, artistic, political or scientific value."

Do these sections under which Lois Chapman was convicted meet the test of obscenity as set out in the case law of Ohio and the federal courts?

The principal cases cited by counsel relate in large measure to books which present a different view than the picture magazines here where very little material is by means of printed words. Nevertheless, the cases are uniform in holding that "obscenity is not within the area of constitutionally protected speech or press" Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 485 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

The business of Avenue News, Lois Chapman's employer, was to sell these obscene magazines for a profit and as was said in Ginzberg v. United States, 383 U.S. 463, 471 (1966):

"***'[i]f the object [of a work] is material gain for the creator through an appeal to the sexual

curiosity and appetite,' the work is pornographic.***"

The court in Miller v. California, supra, at 24, said:

"*** As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct.***"

Depict means to show a likeness of the object by painting or drawing. That is what we have here and very little, if any, word description.

The answer to our question is found in Miller v. California, supra, at 25, which said:

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (B) of the standard announced in this opinion, supra:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

"Sex and nudity may not be exploited without limit by films and pictures exhibited or sold in places of public accomodation any more than live sex and nudity can be exhibited

or sold without limit in such public places. ***"

All of the proscribed depictions were in the material found in the Avenue News Store and all were introduced as exhibits here and admitted to be in the store by the material introduced by the appellant when presenting a defense.

The jury, composed of citizens of the community, surely by their verdict determined that the exhibits herein had no literary, artistic, political or scientific value.

Expert evidence was not required to prove the magazines and papers herein were obscene since the jury from the community had full opportunity to examine them at length in the jury room.

"***The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions.***"

"***

"'In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.'"

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973)

In Roth v. United States, supra, at 484, 485, the court said:

> "***implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. ***
>
> "We hold that obscenity is not within the area of constitutionally protected speech or press."
>
> "***."

The ordinance in question, in the instant case, prohibits the possession and sale of obscene materials to be judged by a jury not on the basis of a survey of the city to establish proof of specific harmful social effect. The jury represents the average persons in the community and by law they determine if the exhibits were obscene, not a social survey.

In Roth v. United States, supra at 491, the court said:

> "It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. Winters v. New York, 333 U.S. 507, 92 L.ed 840, 68 S.Ct. 665. The federal obscenity statute makes punishable the mailing of material that is 'obscene, lewd, lascivious, or filthy*** or other publication of indecent character.' The California statute makes punishable, inter alia, the keeping for sale or advertising material that is

> 'obscene or indecent.' The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.
>
> "Many decisions have recognized that these terms of obscenity statutes are not precise.
>
> "This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ***"

We admit that not all of the cases we have cited deal with the sale of "picture" magazines which we have in the instant case, but most of the cases we have cited bear on the question of how pornographic material relates to enforcement of laws covering similar language to that employed in the ordinance of the City of Tallmadge.

On the subject of overbreadth of an ordinance prohibiting claimed constitutionally protected conduct, the court in Grayned v. City of Rockford, 408 U.S. 104, 114, 115 (1972) said:

> "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. ***
>
> "The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. ***"

The Ohio Supreme Court in State v. Phipps, 58 Ohio St. 2d 271 (1979) discussed a claim of "vagueness" and cited Conally v. General Construction Co., 269 U.S. 385 (1926), in finding that a statute is not vague where men of common intelligence do not have to guess as to its meaning and differ as to its application. Pandering hard core pornography is not constitutionally protected under the First Amendment.

As one reads Chapter 76 of the ordinances of the City of Tallmadge and especially 76.1(F) 1 through 5, we see almost a verbatim statement of R.C. 2907.01(F) about which the Ohio Supreme Court said in State v. Burgun, supra:

> "1. R.C. 2907.01(F), which sets forth the definition of 'obscenity', is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in Miller v. California, 413 U.S. 15.
>
> "2. Precise knowledge of the contents of obscene material is not a prerequisite to satisfy the requirement of scienter to sustain an obscenity conviction. Knowledge of the character or nature of obscene material is a constitutionally adequate indicium of scienter to sustain a conviction under R.C. 2907.32(A)(4)."

We reject assignment of error I.

The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Cuyahoga Falls Municipal Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/S/_____
Presiding Judge
- for the Court -

BELL, P.J.
CONCURS IN JUDGMENT ONLY - SAYING:

> My concurrence is limited to the specific facts here.

MAHONEY, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

HOWARD M. ALLISON, Attorney at Law, 560 Citizens Savings Bldg., Canton, Ohio 44702
and
ELIZABETH REILLY, Attorney at Law, Suite 300-73 E. Mill St., Akron, Ohio 44308 for Appellant
CARMEN V. ROBERTO, Law Director, 2310 Second Street, Cuyahoga Falls, Ohio 44221 for appellee

PROPOSITIONS OF LAW PRESENTED
IN MEMORANDUM IN SUPPORT OF JURISDICTION
TO SUPREME COURT OF OHIO

PROPOSITION OF LAW NO. 2:

The prosecution fail to present adequate proof of the essential elements of the crime herein, because no evidence of the prurient appeal of these materials which depict deviant behavior and no evidence of patent offensiveness or community standards was introduced, and no expert was required despite the direction to "bizarre deviant" groups.

ASSIGNMENTS OF ERROR
TO OHIO COURT OF APPEALS
NINTH APPELLATE DISTRICT

ASSIGNMENT OF ERROR II:

The trial court erred in overruling appellant's motion for judgment of acquittal, as the State failed to produce evidence as to the prurient appeal and/or patent offensiveness of the materials alleged to be obscene, or to prove scienter.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS,
CITY OF TALLMADGE v. LOIS CHAPMAN,
MUNICIPAL COURT OF CUYAHOGA FALLS,
OHIO, CASE NOS. 78 CRB 1144, 78 CRB 1145

EXCERPT FROM MOTION FOR ACQUITTAL:

Transcript of Proceedings, at page 65:

* * *

"Therefore, the State has failed in their burden of proof. They have not presented any testimony to the effect that this would appeal to the prurient interest of a bizarre group. None. In fact, the only testimony they presented was to the effect that 'I can't give an opinion. I'm not qualified. I don't know.'"

* * *

CONSTITUTION OF THE UNITED STATES

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TALLMADGE CITY CODE OF ORDINANCES

Section 76.1 -- Definitions

[A] "Sexual Conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

[B] "Sexual Contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

[C] "Sexual Activity" means sexual conduct or sexual contact, or both.

* * *

[F] When considered as a whole, applying local community standards, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "Obscene" if the following apply"

(1) Its dominant appeal is to prurient interest; and

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite; or

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence,

cruelty, or brutality; or

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose; and

(5) When taken as a whole, it lacks serious literary, artistic, political or scientific value.

[G] "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

[H] "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

Section 76.11 -- Pandering Obscenity

[A] No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division [A], (2) or (4) of this section.

(6) Exhibit obscene material by movie, film or other commercial manner which may be observed by persons, whether minor or adult, who have not by their own choosing entered an enclosed building wherein the same are depicted.

The exhibition of any such obscene material upon any location not completely within an enclosed building shall be prima facie evidence of the violation of this section.

[B] It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

[C] This section shall not apply if the offender has previously been convicted of a violation of this section or of section 76.10 of the Tallmadge City Code of Ordinances, or a violation of Section 2907.31 or 2907.32 of the Ohio Revised Code.

[D] Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree.